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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SGT. CAREY, SGT. GREENE, TIMOTHY MUHALL, and A. CONNORS, R.N. MEDICAL DEPT.,

Petitioners,

-v.-

DONOVAN BLISSETT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STANLEY L. COHEN
119 Avenue D., 3rd Floor
New York, New York 10009
(212) 979-7572

CLAUDIA A. SMITH
110 Maiden Lane
Kingston, New York 12401
(914) 334-9526

JAMES J. BURNS
4 Atrium Drive, Executive Woods
Albany, New York 12205
(518) 458-2094

Dated: October 23, 1998

32 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the attorneys' fee provisions of the Prisoner Litigation Reform Act ("PLRA"), 42 U.S.C. § 1977e(d), must be applied to all awards of attorneys' fees under 42 U.S.C. §1998 in prisoner civil rights litigation made after the effective date of the Act.

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UNITED STATES SUPREME COURT

DONOVAN BLISSETT,

Plaintiff-Respondent,

-against-

SGT. CASEY, SGT. GREENE, TIMOTHY MUHALL, AND A. CONNORS, R.N. MEDICAL DEPT.,

Defendants-Petitioners.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

STATEMENT OF THE CASE

Plaintiff, Donovan Blissett, a prisoner, filed a *pro se* lawsuit on February 28, 1983, against defendants, corrections personnel, claiming that they violated his constitutional rights by physically assaulting him, subjecting him to racial slurs and injecting him with a tranquilizer without his consent. He brought an action under Title 42 U.S.C. Section 1983, claiming that prison personal at Great Meadows Correctional Facility had denied him his Eighth Amendment right to be free from "cruel and unusual punishment".

Mr. Blissett represented himself from the inception of the case until November 18, 1991, when Magistrate Daniel Scanlon, Jr., appointed James J. Burns, Esq., to represent him. In December, 1995, Mr. Burns made a motion to withdraw from the

case after plaintiff became ineligible for *pro bono* counsel. His motion was granted in January, 1996.

In March, 1996, Mr. Blissett asked Stanley L. Cohen Esq., to represent him at trial. At that stage in the litigation, it was necessary to attend several meetings with Mr. Blissett to discuss the case and to prepare him for his testimony. Mr. Cohen, therefore, asked Claudia A. Smith, Esq. to work with him on the case. Ms. Smith and Mr. Cohen divided the work necessary for trial.

The trial commenced on July 1, 1996 and continued to July 3, 1996, then resumed and concluded on July 8, 1996. The jury returned a verdict finding that defendants had violated plaintiff's Eight Amendment right to be free from cruel and unusual punishment and awarded plaintiff $5,600 for compensatory damages. After a separate hearing, the jury awarded plaintiff punitive damages in the amount of $79,981. The total damages awarded to plaintiff were $85,851. Judgment of the verdict was entered on July 8, 1996.

On July 18, 1996, defendants submitted a motion pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure, requesting judgment as a matter of law, or, in the alternative, a new trial. Plaintiff responded on August 23, 1996. On September 18, 1996, under the practice of remittitur, the court, by Memorandum-Decision and Order reduced the punitive damage award to $22,978. On January 27, 1997, the plaintiff accepted the remitted amount in lieu of new trial and on January 28, 1997, the court entered a judgment for the plaintiff in the remitted amount as stated above.

On February 21, 1997, plaintiff, as prevailing party, moved for an award of attorneys' fees pursuant to 42 U.S.C.

Section 1988. On March 10, 1997, defendants' filed their opposition to plaintiff's motion arguing *inter alia*, that the fee award should be governed by the limitations on attorneys' fees applications set forth in the PLRA. A reply Memorandum was submitted by plaintiff opposing that position.

On June 18, 1997, the lower court entered a Memorandum-Decision and Order regarding plaintiff's request for attorneys' fees. (A11-51) The court awarded total fees in the amount of $93, 403.35 to be divided among the three attorneys ($40,749.75 for the services of James J. Burns, $19,515 for the services of Stanley L. Cohen, and $33,138.75 for the services of Claudia A. Smith) (A41)

In so deciding, the court refused to apply the PLRA to any part of the attorneys' fees application stating that such application would have "impermissible retroactive effect" as to all the attorneys involved. The court examined the services performed by the attorneys. First, the court reviewed the work completed by Mr. Burns and held that the PLRA did not apply as the "legal services which he rendered were performed prior to the PLRA's April 26, 1996, effective date. (A24)

The court then analyzed the services performed by attorneys Cohen and Smith holding that they too were not subject to the limitations on attorneys fees provided under the PLRA. Although the court acknowledged that Congress' general purpose in passing the PLRA "was to discourage the filing of frivolous suits and appeals by prisoners" (A25) it stated that it "should not focus exclusively upon when the legal services were rendered, to do so would be too narrow and fail to take into account the reasonable expectations of attorneys Cohen and Smith." Instead, the court determined that the "relevant event is when Cohen and Smith agreed to represent plaintiff Blissett . . .

not when the services were rendered." It also found that application of the PLRA in this particular case would have the effect of disappointing reasonable reliance on prior law, thus "leav[ing] the court with the 'traditional presumption' against retroactive application." (A28).

Moreover, the court also examined the effect of the PLRA upon plaintiff Blissett's award and held that it should not be subject to the provisions of the PLRA. It reasoned that he had settled expectations that should not be disrupted by the PLRA's imposition of the payment of a percentage of his attorneys' fees out of the judgment rendered in his favor. The court stated that to do so would be to take "away a right previously possessed by plaintiff - the right to be fully compensated, without a percentage reduction for attorneys' fees, for a violation of his constitutional rights." (A28)[1]

In an appeal to the Second Circuit, petitioners argued for reversal of the District Court on the ground that the attorney fee provisions of the PLRA must be applied in all cases where the award of fees is made after the effective date of the Act. The Second Circuit rejected the rule advocated by petitioners as too rigid and held that under facts and circumstances of this case, "application of the limitations of the Act to representation begun before its passage could have a seriously detrimental retroactive effect on previously established rights and reasonable prior expectations." (A7). The Court of Appeals was careful to limit its decision to the facts of this case and expressly declined to announce a blanket rule, stating "we leave for another day

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1. After deciding the inapplicability of the PLRA to this case, the court adjusted the hours requested for payment by the attorneys pursuant to 42 U.S.C. Section 1988. The adjustments have not been challenged.

whether the Act should be construed to apply only to representations undertaken after its passage, only to hours worked subsequent to enactment, or whether its application to representations that include activity both before and after the enactment of the PLRA should be left to the informed discretion of the district court." (A7).

ARGUMENT

I.

THE LOWER COURTS CORRECTLY HELD THAT APPLYING THE PLRA IN THIS CASE WOULD HAVE AN IMPERMISSIBLE RETROACTIVE EFFECT

The lower courts correctly held that the limitations imposed by the attorneys' fees provisions of the PLRA should not apply in this case. The Second Circuit correctly rejected the rigid rule advocated by petitioners that the PLRA fee limitations must be applied to all awards made after the effective date of the Act. In so deciding, the court reasoned that to apply the PLRA to this case would fail to take into account the reasonable expectations of the attorneys when they agreed to represent the plaintiff and plaintiff's reasonable expectations when he initiated the action, retained the attorneys and decided to persevere with the action and elected to accept the remittitur rather than a new trial.

The court applied sound statutory interpretive analysis and concluded that Congress did not intend that the attorney fee provisions of the PLRA necessarily apply to all cases pending at the time of enactment. The court stated that application of the fee provisions to this case would constitute an impermissible

retroactive application of a statute under Landgraf v. USI Film Prods., 511 U.S. 244, 250-251 (1994).

A. The Lower Courts Held That Application of the PLRA to the Present Case Would Constitute a Retroactive and Inequitable Application of the Statute That Would Result in Manifest Injustice to Plaintiff and Plaintiff's Attorneys

The lower courts concluded that the attorney fee provisions of the PLRA must not be applied to this case because it would constitute an impermissible and unfair retroactive application of the statute. The courts correctly applied the standard set by the Supreme Court in Landgraf, *supra,* to determine whether or not section 803 of the PLRA should apply retroactively.

Pursuant to the teachings of Landgraf, when legislative intent regarding application of statutes to pending cases is ambiguous, courts must resort to the application of "judicial default rules." *Id.* at 257-263. These rules are guided by the presumption against retroactively applying laws to pending cases:

> [T]he presumption against retroactive legislative is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to confirm their conduct accordingly; settled expectations should not be lightly disrupted.

Id. at 265. (internal footnote omitted).

In determining whether to apply a newly enacted statute to pending cases, a court's first task is to determine whether application of the statutes would have a retroactive effect. *Id.* at 280. The Court described this process thus:

> [T]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change of law and the degree of connection between the operation of the new rule and a relevant past event...[F]amiliar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Id. 269-270. As further description of a retroactive effect, the Landgraf Court quoted favorably from Justice Story:

> [E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retroactive.

Id. (quoting Society for Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (No. 13, 156) (CCDNH 1814) (emphasis added).

If the application of the statute would have a retroactive effect, the statute should not be applied to the case absent clear congressional direction. *Id.* at 280. In Hughes Aircraft Co. v.

U.S., 117 S. Ct. 1871 (1997), this Court stated that Justice Story's definition "does not purport to define the outer limit of impermissible retroactivity." *Id.* at 1876. Indeed, the Court in Hughes signaled that the circumstances in which a newly enacted statute will be applied to cases pending at the time of the statute's passage are extremely limited. *Id.* at 1878.

In Landgraf, the plaintiff alleged that she was the victim of sexual harassment from 1984 to 1986. At the time she filed suit in 1989, the relief authorized by Title VII was limited to backpay and injunctive relief. While the case was on appeal, Congress passed the Civil Rights Act of 1991, which added damages as an available remedy for certain kinds of discrimination. The plaintiff requested a remand for a jury trial on damages. *Id.* at 247-249. In Landgraf the Court declined to apply the statute to the case, finding that the application of the damages provision of the 1991 Act to pre-enactment conduct would have a retroactive effect because it would impose a new legal burden -- liability for damages -- on past conduct. *Id.* at 280-285. Similarly, in Hughes, the plaintiff's suit related to events that occurred between 1982 and 1984, at which time such suits were barred. After the relevant statute was amended to allow such actions, the plaintiff filed suit. The Supreme Court dismissed the suit, finding that applying the amendment to the case would give a retroactive effect to the statute. It would "impose new duties with respect to transactions already completed" by increasing the monetary liability for defendant's action; it would "attach a new disability, in respect to transactions or considerations already past" by eliminating a defense that the defendant had under prior law; and it would "create a new cause of action *Id.* at 1880.

The lower courts in this case correctly applied the process described in Landgraf, and followed in Hughes, when they

concluded that the PLRA's limitations on attorneys' fees should not apply despite the fact that, in the case of attorneys Cohen and Smith, the majority of the work had been completed after the passage of the Act. In so deciding, the district court stated:

> To be sure those attorneys did complete most of their work on this case after the PLRA's effective date. Contrary to what defendants implicitly suggest, however, in determining whether to retroactively apply section 1997e(d) to this case, the court should not focus exclusively upon when they agreed to represent plaintiff Blissett...When the court focuses on the circumstances under which attorneys Cohen and Smith agreed to represent plaintiff, it is persuaded that application of section 1997e(d) of the PLRA would "impose new duties with respect to transactions already completed; and thus have an impermissible "retroactive effect."

(A26-27) (citations omitted)

The district court further supported its reasoning by adopting rationales set forth in other circuit courts which had directly confronted the issue of retroactive application of this section of PLRA. In Jensen v. Clarke, 94 F. 3d 1191 (8th Cir. 1996) the Eighth Circuit declined to apply section 1997e(d) retroactively because the PLRA "was not in effect when the plaintiffs' attorneys accepted their appointment". *Id.* at 1202. The district court also noted the Seventh Circuit similarly held that 1997e(d) does not have retroactive effect. In Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996), the court stated that "[t]o give it [the Act] such effect would attach new legal consequences to completed conduct, namely the services rendered by the plaintiff's counsel in advance of the passage of the Act." *Id.*

On appeal the Second Circuit rejected petitioners assertion that the lower court erred in its application of Landgraf, and bound their reliance upon the Fourth Circuit's decision in Alexander S. v. Boyd, 113 F3d 1373 (4th Cir. 1997), cert. denied, 118 S. Ct. 880 (1998) to be entirely misplaced. In expressly rejecting the Fourth Circuit's conclusion that the PLRA's attorney fee provisions apply to all awards of attorney fees made after April 26, 1996, regardless of when the work was performed and, in disagreeing that the "plain language" of the statute required this result, the Second Circuit found that attorney fee awards were not necessarily "collateral" or "secondary" to the substantive rights of parties and accordingly elected to apply the retroactivity analysis. *Id.* at 1386-1388.[2]

The Second Circuit correctly rejected the Fourth Circuit's reasoning. The Boyd court misstates Landgraf when it claims that the Supreme Court "noted that application of a new statutes that affects only secondary, rather than primary, conduct does not give rise to concerns about retroactivity". *Id.* at 1387. Landgraf did not classify all attorneys' fees provisions as having no impermissible retroactive effect; rather, it acknowledged that the application of a recently enacted attorneys' fee provision in Bradley v. School Board of the City of Richmond, 416 U.S. 696, 722 (1974), would not generate a retroactive effect because the provision did not alter the existing rights of the parties. Landgraf, 511 U.S. at 277-278. In Bradley, attorneys' fees were awarded under the court's inherent equitable powers before enactment of a statute that created an additional basis of support for an award of fees. *Id.* Landgraf's endorsement of Bradley did not establish that attorneys' fees as a class, have no

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2. Since the Second Circuit's affirmance, the Ninth Circuit has agreed with Boyd, at least so far as fees for post enactment work are concerned. See Madrid v. Gomez, 150 F.3d 1030 (9th Cir. 1998).

"impermissible retroactive effect". Rather, the Court held that under the circumstances in Bradley, applying the statute retroactively would not result in a change in the parties' expectations or liabilities.

In Covino v. Reopel, 89 F.3d 105 (2d Cir. 1996), this Court recognized the point of clarification that Landgraf was making when it stated "[a] new attorney's fee provision may be applied to pending litigation" (citing Landgraf, 114 S. Ct. at 1503), at least in circumstances like those presented in Bradley v. Richmond School Board. *Id.* (emphasis supplied). Thus the Boyd court was flawed by inaccurately reading Landgraf as holding that all newly enacted attorneys fees statute are incapable of creating impermissible retroactive effect.

Boyd's determination that the clear language of the statute mandates that the PLRA be applied to all orders awarding attorneys' fees entered after the effective date the statute is similarly flawed. Boyd, 113 F.3d at 1386. As the dissent notes, the majority's reliance on its interpretation of the phrase "award of attorneys' fees" in section 1997e(d), is hardly sufficient "to establish that Congress clearly prescribed the reach of the statute". *Id.* at 1393 (Murnaghan, J. dissenting).

Moreover, petitioners' primary/secondary analysis fails to address subsection (2) of section 803 that states in pertinent part:

> Whenever a monetary judgment is awarded a portion of the judgment (not to exceed 25%) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150% of the judgment, the excess shall be paid by the

defendant.

This section, if applied, would require plaintiff Blissett, to pay his attorneys a portion of his judgment. Certainly petitioners cannot and do not attempt to argue that a reduction in plaintiff's judgment is either collateral or secondary to the rights of the plaintiff. Accordingly, even if one accepted petitioners' argument with respect to primary and secondary effects, application of the statute herein to Blissett would have the obvious and primary effect of reducing his judgment. Clearly this is the very type of retroactive effect circumscribed by the Court in Landgraf.

Indeed, both lower courts herein were concerned that application of the PLRA would effect settled expectations of the plaintiff and held that to apply the statute to the plaintiff would result in an impermissible retroactive effect. The district court stated:

> [A]pplication of section 1997e(d) to the present case imposes an entirely new obligation on plaintiff Blissett that did not previously exist -- payment of a percentage of his attorneys' fees out of the judgment rendered in his favor. Likewise, it takes away a right previously possessed by plaintiff - the right to be fully compensated, without a percentage reduction for attorneys' fees for a violation of his constitutional rights.
> (JA51-52)

Defendants' suggestion that neither plaintiff Blissett nor his attorneys possessed any substantive right to pre-PLRA compensation is similarly untenable. Plaintiff had settled expectations at the inception of his lawsuit that if he prevailed,

a jury would compensate him for his injuries and would pay his attorneys' fees. He was further apprised of his rights in a letter he received from Honorable Neal P. McCurn dated December 19, 1995. In that letter, Judge McCurn informed plaintiff that if he prevailed, the defendants would pay all costs and fees in his attorneys at reasonable hourly rates.[3]

As for attorneys Cohen and Smith, defendants contend that plaintiff's counsel could not reasonably expect to recover attorneys' fees after the adoption of the PLRA. Again, they are incorrect. They do not dispute the lack of legislative history concerning the attorneys' fee provision of the Act, yet they expect the plaintiff's counsel would assume that this provision would be applied retroactively to an on-going case, particularly where, as here, the changes in the law are neither minor nor procedural but, rather, involved material, substantive changes to existing rights under 42 U.S.C. Section 1988[4]

Defendants further contend that plaintiff's counsel did not have any reasonable expectation to any particular amount of fee award. They argue that since section 1988 gave the district court discretion with respect to the hourly rate and the hours to be

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3. Moreover, in October, 1992, Mr. Blissett prevailed at trial in another Section 1983 lawsuit commenced in the Western District of New York, See, Blissett v. Coughlin, 66 F.3d 531 (2d Cir. 1995). He was awarded $120,000.00 in damages (later reduced to $90,000 by agreement) and learned then that as a prevailing party he was also entitled to make an application to have the defendants pay the attorneys fees incurred pursuant to 42 U.S.C. Section 1988.

4. Defendants, without citation, label the attorneys' fees provision in section 803 of the PLRA, as "procedural in nature" like section 802 of the Act. This claim is completely unsupported and inconsistent with Congress' intent in amending Section 1988.

compensated, such discretion is to be applied with an "eye to moderation." What this argument fails to acknowledge, however, is that it has long been settled that a "reasonable" fee for purposes of section 1988 is a fee that is based on market rates for the services rendered. See Missouri v. Jenkins, 491 US 274 (1989); Loper v. New York City Police Dep't, 853 F.Supp 716, 719 (S.D.N.Y. 1994). Thus, imposing fees at this late date that are below the market rate would clearly frustrate counsels' settled expectations of obtaining a reasonable fee under section 988.

Notwithstanding petitioners' confused banter to the contrary, the lower courts correctly held that both the plaintiff and his attorneys did have settled expectations that if they prevailed in the section 1983 action that the plaintiff would receive a monetary judgment and that his attorneys' fees would be paid at the prevailing market rate. Application of section 803 of the PLRA would seriously upset these settled expectations and create an impermissible retroactive effect that would cause manifest injustice.

Moreover, petitioners' implication that the plaintiff's attorneys had no reasonable expectation to a fee in excess of the damage award is internally inconsistent. The Second Circuit aptly points out in its decision that there are certain rights, the vindication of which costs far more than what the victim is awarded in damages. (A6). Even petitioners' seem to suggest that this is not uncommon. "New York often views 'the risk of an attorney's fee award as the most significant liability in the case." (A13, quoting, Evans v. Jeff D., 475 U.S. 717 at 735 (1986)). It is hard to fathom why the expectations of plaintiff's attorneys to a fee at market rate, even if that fee exceeded the monetary damages awarded to plaintiff, would have been unreasonable if, as petitioner's say, such a fee "is not unusual." (A13).

B. The Lower Court Correctly Decided That Congress Intended for The PLRA's Attorney Fee Provisions to Apply only to Cases Filed After Passage of the Act.

In applying the traditional tools of statutory interpretation to the text at issue as well as to the language and design of the statute a a whole the Second Circuit correctly reasoned that Congress did not intend retroactive application of the PLRA fee limitations. K Mart Corp. v. Carier, Inc., 486 U.S. 281, 291 (1988); Alabama Power Co. v. United States E.P.A., 40 F. 3d 450, 454 (D.C. Cir. 1994); Lindh v. Murphy, 521 U.S. 320, 138 L.Ed. 481, 117 S.Ct. 2059 (1997).

The district court found that section 802 of the PLRA specifically speaks to a retroactive application whereas section 803 is silent. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983). The ancient maxim of statutory interpretation must be applied unless there is clear evidence of a contrary legislative intent. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); see also, Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993).

Section 803 is silent as to whether it should be applied retroactively to pending cases or only prospectively to cases filed after the Act's passage. Section 803 of the attorney fee provisions of PLRA state in relevant part:

> (d) Attorneys fees. (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that - -(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights. . .
>
> * * *
>
> (3) No award of attorney's fees in any action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, United States Code, for payment of court-appointed counsel.

42 U.S.C. Section 1997e.

In stark contrast, section 802 of the Act, which addresses "appropriate remedies" in prison conditions litigation, explicitly states that the section is to be applied to pending cases, as follows:

> Section 3626 of Title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief <u>whether such relief was originally granted or approved before, on, or after the date of the enactment of this title</u>.

Id. (emphasis supplied).

This district court concluded that given the inclusion of an explicit statement that section 802 applies to pending cases,

and the absence of a similar provision in section 803 addressing attorney fees, Congress clearly intended that the attorney fee provisions only apply to those cases filed after the enactment of the Act. In analyzing the PLRA the Eighth Circuit reached the same conclusion:

> [T]here is evidence on congressional intent contrary to retroactive application of [the attorney fees] portion of the Act. Section 802, the section of the Act dealing with prospective relief, specifically provides that it "shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of enactment of this title." Sec. 802(b)(1). Section 803, conversely, is silent on retroactive application. Congress saw fit to tell us which part of this Act was to be retroactively applied, Section 802. The exclusion of Section 803 and its fee provisions from that clear statement is inconsistent with the defendants' argument for retroactivity.

Jensen v. Clarke, 94 F. 3d 1191 at 1203 (8th Cir. 1996). Accord, Cooper v. Casey, 97 F.3d 913 (7th Cir. 1996); Weaver v. Clarke, 933 Fed. Supp. 831, 835 (D. Neb. 1996), aff'd, 120 F.3d 852 (8th Cir. 1997).

The explicit deletion of attorneys' fees from section 802 provides persuasive evidence that Congress intended prospective application of the attorneys' fees section. This conclusion finds substantial support in a recent Supreme Court decision, Lindh v. Murphy, 521 U.S. 390 (1997). In Lindh, the Supreme Court held that a certain provision of the "Antiterrorism and Effective Death Penalty Act of 1996" (AEDPA") is inapplicable to cases pending

when the Act was passed. The principal basis for the Court's decision was the AEDPA consists of two chapters, only one of which contains a provision (section 107(c)) specifying its applicability to pending cases, thereby creating the "negative implication that Congress intended for the provisions in the other chapter (which included the provision at issue in the case) to be inapplicable to pending cases". This negative implication arises because the two chapters had been joined together and introduced as a single bill, and were thus being simultaneously considered, at the time that section 107(c) was added (although they began life independently and in different Houses of Congress). The Court distinguished this legislative history from one in which "two chapters had evolved separately in the congressional process, only to be passed together at the last minute." *Id.*

Contrary to what defendants have argued, this reasoning can also be applied to the PLRA in examining its inception more closely. The precursor to the PLRA was the "Stop Turning Out Prisoners Act," known by the acronym "STOP", which was introduced as Title II of H.R. 667 in the House of Representatives and S. 400 in the Senate. In this version of the bill, the injunctive relief provisions and the attorney fee provisions of the PLRA appeared together in a single section that was subject to an explicit statement of its application to all cases then pending.[5] Thereafter, S. 400 was added by the Senate Appropriations Committee as Title VIII of the Commerce, State & Justice Appropriations bill ("CS&J bill"). During Senate floor debate on the CS&J bill, on September 29, 1995, STOP was

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5. The bill stated that all of its provisions were applicable to all relief, whether granted or approved before, on, or after the date of the enactment of this Act. See Sec. 2(b) in H.R. 667; Sec. 301(b) in S. 400.

replaced by a "Dole-Hatch substitute" bearing the moniker of the statute that ultimately became law. The vast majority of S. 400's provisions, including the retroactivity provisions, appeared in section 802 of the substitute bill. However, the attorney fee provisions had been extracted from this section and transferred to a new section of the bill, namely, section 803, which did not contain a retroactivity provision. The statute retained this structure until its final passage.

As described above, at the time that the PLRA's attorney fee provisions were transferred from a section that was subject to a retroactivity provision to one that was not, the two sections "had already been joined together and were being considered simultaneously" by Congress. These two sections did not "evolve separately in the congressional process, only to be passed together at the last minute." Thus, as in Lindh, a negative implication arises that the attorney fee provisions are inapplicable to cases pending when the Act was passed. Accord, Boria v. Keane, 90 F.3d 36 (2d Cir. 1996).

As the district court recognized, the presence of retroactive application in section 802 and the absence of it in section 803 only further supports the holding that the PLRA should not be applied to cases, such as this one, where the action was initiated and expectations settled before the passage of the Act.

II. THIS CASE DOES NOT PROVIDE THE APPROPRIATE VEHICLE FOR THE COURT TO RESOLVE THE DIFFERING INTERPRETATIONS GIVEN THE PLRA BY THE LOWER COURTS

This court does not sit to merely arbitrate differences of opinion in the Circuits. Were that the case the Court would have agreed to hear Alexander S. v. Boyd, *supra,* which stood in stark contrast to the approach taken by the Seventh and Eighth Circuit in Cooper v. Casey, *supra*, and Jensen v. Clark, *supra*, respectively. While recognizing the differences of approach taken by various circuit courts, there are other factors that militate strongly against the granting of *certiorari* in this case.

A. Petitioners' Attorneys Fees Argument Was An Unsupported Afterthought in the District Court.

Petitioners are seeking review in this Court of an issue they barely raised in the district court. Indeed, the district court came within a breadth of imposing Rule 11 sanctions on petitioners on the very point for which they now seek Supreme Court review.

In rejecting petitioners' arguments on the retroactive application of the PLRA fee limitation the district court opined:

> "With absolutely no discussion defendants assume that section 1997e(d) in its current form applies to the fee applications of the three attorneys who have represented plaintiff over the course of this litigation."

(A20)

Then in footnote 16 the court went on to chastise petitioners:

> "As will be seen, defendants' failure to discuss the retroactivity issue is inexcusable given the existence of case law, albeit scant, addressing that issue. Indeed, although the court will not do so, defense counsel's failure to support his argument that this fee motion is governed by section 1997e(d), as well as his failure to cite any authority contradicting this argument, arguably could give rise to an award of Rule 11 sanctions. See Allstate, supra, 163 F.R.D. at 200 (ordering defense counsel to show cause why she should not be sanctioned under Rule 11 where she "fail[ed] to present the Court with authority to support here argument...,[and] she neglected to cite any of the cases that contradict [her] argument").

Id.

By this point, plaintiff does not claim that the PLRA issue is unpreserved and thus beyond the jurisdiction of the Court. Although petitioners have barely preserved the issues raised in their petition they did so as an afterthought in the district court, without a single citation. This is hardly the commitment of zealous advocacy necessary and appropriate for arguments before the Supreme Court.

B. Petitioners' View of The Case Advanced Before the Second Circuit and In Their Petition To This Court Does Not Provide The Court with The Full Range of Argument or Options to Resolve the Issue Presented.

It cannot be argued that the Fourth and Ninth Circuits appear to be out of step with the other circuits that have addressed the retroactivity question posed in this case. It is important to identify what the Second Circuit actually held in this case. The Second Circuit did not hold that the fee limitations of the PLRA may never be imposed on fees earned pre enactment; nor did the court rule out an apportionment approach for time worked before and after enactment. The Court simply rejected petitioners' claim that, regardless of settled expectations and regardless of when the fee was earned, the PLRA fee limitations apply to all fees awarded post enactment.

Thus, given the narrowness of petitioners' analysis, this case only presents half the conflict between the circuits. Petitioners arguments make the retroactive application of the fee limitations an all or nothing proposition, whereas the Court in Landgraf mandated a more fact sensitive inquiry into the settled expectations of the affected attorney and her client. Indeed, there may well be no conflict between the Circuits on fees for post enactment work. Because of petitioners' argument, the Second Circuit was not afforded the opportunity to rule on this issue; neither will this Court, should it grant *certiorari*.

Moreover, although a conflict between the Circuits exists, it is not a conflict over the appropriate legal standard. The legal standard was established by the Court in Landgraf and refined in

Hughes -- there must be strong evidence of Congressional intent to apply a statute retroactively if to do so would disrupt settled expectations. The Fourth and Ninth Circuits have been satisfied that application of the fee limitations would not disrupt the settled expectations of the attorney and his client. In this case, the Second Circuit applied the same standard and concluded differently under all the facts and circumstances.

As noted, the Second Circuit rejected the notion that all post enactment fee awards must be subject to the fee limitations of the PLRA. The Court concluded that given petitioners' argument it was unable to decide more:

> We therefore reject the sole contention advanced by the defendants as a basis for vacating the district court's fee award. The defendants did not contend either in the district court or on appeal that the trial judge abused his discretion in failing to impose the PLRA's restriction on the fee award. Accordingly we leave for another day whether the Act should be construed to apply only to representations undertaken after its passage, only to hours worked subsequent to enactment, or whether its application to representations that include actively both before and after the enactment of the PLRA should be left to the informed discretion of the district court. (A7)

III. Expectations Are Now Settled in Most Circuits; Any Decision by This Court Will Unsettle Those Expectations and Lead to Further Litigation.

As noted, the linchpin of the retroactivity analysis pursuant to Landgraf is to define the reasonable and settled expectations of the attorney and her client. At this point, those expectations are settled in most circuits.

The fact that the rules differ between circuits is not as significant as the fact that the issue is settled in those circuits. Ironically, should this Court undertake to resolve the "conflict" between circuits, whichever way the court decides will disrupt the settled expectations of some and will stimulate even further litigation on this particular issue. Given the fact that as each day passes the numbers of pre enactment cases dwindles, it is sounder policy and more consistent with Landgraf to allow the settled expectations to remain so and to deny *Certiorari* in this case.

CONCLUSION

Whenever conflict exists between the circuits with respect to the retroactive application of the PLRA fee limitations is not fully presented by this case. *Certiorari* should be denied.

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Respectfully submitted,

STANLEY L. COHEN
Attorney for Respondent
119 Avenue D
New York, New York 10009
(212) 979-7572

CLAUDIA A. SMITH

JAMES J. BURNS

Of Counsel